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No. 98-390

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

MICHAEL K. DEPAEPE, EXECUTOR OF THE ESTATE OF KENNETH J. DEPAEPE,

Petitioner,

v.

GENERAL MOTORS CORPORATION,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF IN OPPOSITION

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November 9, 1998

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QUESTIONS PRESENTED

1. Did the Court of Appeals properly hold that the errors committed by the District Court were not harmless?

2. Did the Court of Appeals properly hold that Federal Motor Vehicle Safety Standard 201 §3.4.1—which requires cars to be equipped with "[a] sun visor that is constructed of or covered with energy-absorbing material"—does not impose a specific performance standard?

RULE 29.6 STATEMENT

Pursuant to Supreme Court Rule 29.6, General Motors Corporation advises the Court that the following is a list of General Motors' non-wholly-owned subsidiaries as reported to the Securities and Exchange Commission in Exhibit 21 to General Motors' Form 10-K Annual Report for the year ended December 31, 1997.

Aisin GM Allison Co., Ltd.
Auto Cable Industries (Pty) Limited
Convesco Vehicle Sales GmbH
Componentes Para Automotores, S.A. de C.V.
Delphi Cableados, S.A. de C.V.
Delphi France Automotive Systems
Delphi Calsonic Compressors, S.A.S.
Delphi Chassis Systems Krosno
Delphi Harrison-Calsonic
GMC Truck Motors Development Corporation
GM Ovonic L.L.C.
General Motors de Argentina S.A.
General Motors (Thailand) Ltd.
General Motors Automobiles Philippines, Inc.
General Motors Colmotores, S.A.
General Motors Holding Espana, S.A.
General Motors Holdings (U.K.)
General Motors Kenya Limited
GM Holding (Portugal) SGPS, Lda.
General Motors Investment Services Company N.V.
General Motors Peru S.A.
GM-Saab Communication GmbH
Packard CTA Pty. Ltd.
Packard Electric Systems Samara Cable Company
Provencorp S.A.
P.T. Packard Kabelindo Murni Indonesia
Radiadores Richard, S.A.

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INTRODUCTION

According to Petitioner, the Seventh Circuit's decision in this products liability case creates a circuit split on a "vitally important issue," and threatens to "have a major impact on the construction and enforceability of motor vehicle safety standards." Pet. at 14, 20. The Court should not be misled by this statement. As we explain below in this Opposition, this case is paradigmatically uncertworthy:

First, the circuit split that Petitioner claims to have identified —concerning the proper construction of federal motor vehicle safety standards ("FMVSS")—is nonexistent. Moreover, the Seventh Circuit's interpretation of the particular FMVSS at issue, which aligns precisely with the view of the agency that promulgated it, was entirely correct.

Second, the Seventh Circuit's interpretation of the FMVSS at issue in this case is neither dispositive of the case, nor really even the primary issue in the case. Rather, the dispositive issue in this case is the Seventh Circuit's independent holding that Respondent General Motors Corporation ("GM") was unfairly prejudiced by the district court's sudden, *sua sponte*, mid-trial reversal of course on the critical question whether evidence would be admitted regarding GM's alleged noncompliance with the FMVSS at issue. The district court initially had allowed Petitioner to present seven days of testimony aimed at establishing that GM had *not* complied with the FMVSS, but then (after *sua sponte* invalidating the regulation) barred GM from presenting any evidence to rebut Petitioner's testimony regarding the FMVSS. The Court of Appeals held that it was error to impose on GM this mid-trial "enforced quietus" on the subject of FMVSS compliance, and that such error was not harmless. In challenging this independent basis for reversal, Petitioner merely takes issue with the Seventh Circuit's harmless error analysis. In reality, therefore, the Petition presents nothing more significant than the question whether the Court of Appeals' harmless error ruling was correct. Petitioner offers no explanation as to why the Court should grant review

to consider a case-specific application of well-settled harmless error law.

Finally, even reversing the Court of Appeals' routine harmless error holding would not entirely dispose of this case. That is so because the Court of Appeals also held that the district court erred in allowing Petitioner's expert to testify that the reason why GM designed the product at issue the way it did was to save money. That error was grossly prejudicial, and alone suffices to require a new trial. Petitioner has not even challenged this third, independent ground for vacating the judgment and ordering a new trial.

COUNTERSTATEMENT OF THE CASE

In 1984, Kenneth J. DePaepe was involved in an automobile accident while driving a 1984 Buick Regal. Mr. DePaepe was rendered quadriplegic in the accident, and filed suit against GM. After a full trial in 1992, a jury returned a complete defense verdict for GM. The Seventh Circuit, however, in 1994 ordered a new trial on the ground that it could not be certain that an error in one of the district court's jury instructions was harmless. *See* 37 F.3d 373 (7th Cir. 1994). This case thus arises from the re-trial of Mr. DePaepe's lawsuit. *See* Appendix to Petition for Writ of Certiorari ("App.") at 1a-2a.

At various stages of this case, Petitioner[1] has pointed to at least ten different alleged defects with his Buick Regal as

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[1] Kenneth DePaepe died in 1997, while this case was on appeal in the Seventh Circuit. Accordingly, the Petitioner is not Kenneth DePaepe, but rather his son and executor Michael DePaepe. To avoid confusion, however, this brief will use the term "Petitioner" to refer to the party that is pursuing legal action against GM, regardless of whether that party is, at the time in question, Kenneth DePaepe or his executor.

having been responsible for his injuries.[2] On re-trial, Petitioner settled on the principal theory that the *sun visor* of his car had been defectively designed. Petitioner, who was unbelted at the time of his collision, maintained that the sun visor was insufficiently padded to prevent him from breaking his neck when the force of the collision caused his head to strike the sun visor/headliner on the passenger side of the vehicle.[3] *Id.*

I. Proceedings in the District Court.

Prior to trial, GM learned that Petitioner intended to prove this supposed padding defect primarily by arguing to the jury that GM had failed to comply with FMVSS 201 § 3.4.1. That standard provides that motor vehicles must be equipped with "[a] sun visor that is constructed of or covered with energy-absorbing material." 49 C.F.R. 571.201 § 3.4.1 (1996).[4] The sun visor in Petitioner's car consisted of fiberboard mounted on a metal sleeve, covered with energy-absorbing polyurethane

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[2] In addition to the defective-sun-visor theory upon which he ultimately settled, Petitioner at various stages of the first and second trials has identified the following components of the 1984 Buick Regal as being allegedly defective or unsafe, and as having contributed to or caused his injuries: (i) the brake design; (ii) the steering; (iii) the windshield header; (iv) the seat and seat back; (v) the headliner; (vi) the driver's seat belt; (vii) the shoulder harness; (viii) the front-end integrity; (ix) the overall stability of the vehicle; (x) the lack of an air bag; and (xi) the seat belt warning system. *See* Appendix of Appellant General Motors Corporation in *DePaepe v. General Motors Corp.*, No. 96-3886 (7th Cir.) ("CA7 App.") 399, 464, 515-60.

[3] Petitioner incorrectly asserts that the parties were "in agreement that Kenneth DePaepe's neck broke when his head was caught on the sun visor." Pet. at 6. GM never agreed that Mr. DePaepe's head was "caught on" the visor, but instead merely did not dispute that petitioner broke his neck *when* he came into contact with the visor (and any other interior component he contacted as a result of being involved in a violent collision while not wearing his seat belt).

[4] As Petitioner notes, *see* Pet. at 7 n.3, the standard is now FMVSS 201 § 5.4.1, and is found at 49 C.F.R. § 571.201 § 5.4.1, but remains unchanged.

foam and woven cloth; it was (and remains) undisputed that the foam covering is energy-absorbing material. Appendix of Appellant General Motors Corporation in *DePaepe v. General Motors Corp.*, No. 96-3886 (7th Cir.) ("CA7 App.") 202-209, 231, 283. Accordingly, GM filed a motion in limine asking the district court to exclude any evidence of supposed noncompliance with FMVSS 201 § 3.4.1, and to instruct the jury that GM had complied with the standard. App. 2a-4a.

In its motion, GM argued that admitting testimony regarding compliance with FMVSS 201 § 3.4.1 would be improper because, among other reasons, FMVSS 201 § 3.4.1 does not impose a "performance" requirement with respect to the energy-absorbing capabilities of sun visors—that is, the standard does not specify "how much" energy the covering material must absorb. Moreover, GM argued that under settled Seventh Circuit precedent, it was up to the court, not the jury, to determine compliance with federal safety standards. App. 2a.

In response to the motion in limine, Petitioner argued—as he does again in this Court—that even though the plain terms of FMVSS 201 § 3.4.1 do not specify "how much" energy the sun visor covering must absorb, the regulation should nonetheless be interpreted as imposing a "performance standard." Specifically, Petitioner's view is that FMVSS 201 § 3.4.1 implicitly requires that sun visors provide "reasonable protection," and it is up to the jury, not the court, to determine what constitutes "reasonable protection." App. 2a-4a.

The district court issued two rulings regarding FMVSS 201 § 3.4.1, and these rulings figured prominently in GM's later appeal.

First, the district court denied GM's motion in limine. Accepting Petitioner's theory, the Court interpreted FMVSS 201 § 3.4.1 as imposing a generalized performance standard that the energy-absorbing materials of sun visors must provide

occupants with "reasonable protection," and held that it would be up to the jury to determine what level of protection is "reasonable." CA7 App. 125. Pursuant to this ruling, Petitioner began his case by presenting seven days of argument and evidence in support of his claim that GM had not complied with FMVSS 201 § 3.4.1.[5] *See* App. 2a-3a, 5a; CA7 App. 200-06, 208-14.

Second, after Petitioner had presented this extensive evidence regarding GM's supposed noncompliance with the standard, the district court—acting *sua sponte* and without warning the parties—"stunned everyone by declaring FMVSS 201 § 3.4.1 invalid and forbidding either side to mention it again in the jury's presence." App. 3a. The district court declared the standard invalid because, in the court's view, it violated 15 U.S.C. § 1392(a) (1982),[6] which requires federal motor vehicle safety standards to "be practicable, meet the need for motor vehicle safety, and . . . be stated in objective terms." *Id.* at 3a, 5a.

As the Seventh Circuit noted, both sides "were flummoxed" by the district court's mid-trial invalidation of the standard.

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[5] In the Court of Appeals, Petitioner argued that he had not presented evidence of GM's alleged noncompliance, because although he introduced the jury to FMVSS 201 § 3.4.1 and to GM's treatment of the regulation, he was (as a result of the district court's subsequent invalidation of the standard, *see infra*) "cut off before he could administer the *coup de grace* by showing noncompliance." App. 5a. The Seventh Circuit rejected that version of events, explaining that "after a review of the facts, we conclude that much that was said, and more that was implied, during plaintiff's presentation conveyed the view that GM did not comply with FMVSS 201 § 3.4.1 and that its certification of compliance was disingenuous." *Id.* Although Petitioner again asserts (in his Statement of the Case) that he "presented no direct evidence that the visor violated FMVSS 201 § 3.4.1," he does not challenge the Seventh Circuit's ruling that his evidence "conveyed the view that GM did not comply."

[6] Section 1392(a) has since been recodified as 49 U.S.C. § 30111(a).

Id. at 3a. Petitioner's counsel strenuously objected to this ruling, arguing that the district court lacked authority to invalidate the standard. *Id.*; CA7 App. 342. GM, for its part, moved for a mistrial on the ground that the jury would be unable to disregard the evidence and argument Petitioner had presented to that point regarding GM's alleged noncompliance with the standard. *Id.* at 103. In his effort to convince the district court that it had erred in invalidating the standard, *Petitioner's counsel* concurred with GM's assessment, agreeing that it would be "*impossible to erase what this jury has heard on this subject from their minds*"—*i.e.*, that a curative instruction would be ineffective. *Id.* at 341-42, 347.

Unpersuaded by the parties' protests, the district court proceeded with the trial. The court instructed the jury to disregard the seven days of evidence of GM's supposed failure to comply with FMVSS 201 § 3.4.1, and prohibited the parties from making any further mention of the standard.[7] App. 3a, 4a.

One final ruling by the trial court is relevant to the Petition. Stephen Syson, a professional expert witness who testified in support of Petitioner's defective design theory, was asked by Petitioner's counsel to opine as to why GM reduced the amount of padding in its sun visors. Although lacking any basis to offer an opinion on this question, Syson replied that GM had done so to save money. The district court overruled GM's objection to this testimony, stating that "as an expert, he can speculate." CA7 App. 371.

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[7] GM objected to the particular "curative" instruction given by the district court. This objection was based on the fact that the instruction told the jury to disregard all evidence relating to FMVSS § 3.4.1, but then went on to state that *the jury could nonetheless consider* "evidence that relates in part to Section 3.4.1 or compliance or noncompliance with Section 3.4.1" if that evidence also related "in part to some other issue or issues in the case," such as "whether the 1984 Buick Regal's sun visors were unreasonably dangerous and/or whether GM was negligent in the design or testing of the visors." App. 28a-29a.

The jury rendered a $12.6 million verdict in Petitioner's favor. GM filed post-trial motions for judgment as a matter of law and for a new trial, both of which were denied.

II. Proceedings in the Court of Appeals.

A. The parties' arguments.

GM appealed to the Seventh Circuit, and the district court's handling of FMVSS 201 § 3.4.1 figured prominently among GM's arguments for reversal. GM thus argued, *first*, that the district court had erred in denying GM's motion in limine, because that denial was based on the district court's mistaken view that FMVSS 201 § 3.4.1 constituted a "performance standard" rather than a mere "design standard." *Second*, and relatedly, GM argued that the district court had erred by delegating to the jury the responsibility for determining whether GM had complied with the safety regulation. *Third*, GM urged that the district court was without authority to invalidate FMVSS 201 § 3.4.1. *Finally*, GM maintained that the district court had further erred, following its invalidation of the standard, by refusing to allow GM to rebut Petitioner's evidence of noncompliance; GM argued that the district court was bound either to allow such rebuttal, or to grant a mistrial. *See* Brief for Appellant General Motors Corporation in *DePaepe v. General Motors Corp.*, No. 96-3886 (7th Cir.) ("GM CA7 Br.") at 21-33. In addition to these FMVSS-related claims of error, GM argued that the district court had erred by allowing Syson to speculate regarding GM's motives for reducing the amount of padding in the sun visor. *Id.* at 39-44.[8]

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[8] On appeal, GM did not assert the district court's ruling on the new trial motion as a separate and independent assignment of error; instead, it challenged the district court's various rulings in the context they were rendered (*e.g.*, GM challenged the district court's denial of its motion *in limine* regarding FMVSS 201 § 3.4.1).

GM expressly acknowledged that "[a]n error is harmless if it does not affect the substantial rights of the parties," but explained that "allowing the jury to hear extensive evidence suggesting that GM violated FMVSS 201 was certainly not harmless error in this case." *Id.* at 25; *see also id.* at 31-32, 33 ("Once again, the error here is not harmless, and requires reversal."). To that end, GM highlighted the concessions by Petitioner's counsel that the jury could not be expected to disregard the FMVSS evidence it had heard, and cited Seventh Circuit precedent for the proposition that the prejudice created by the one-sided introduction of evidence constitutes reversible error. *Id.* at 31-32 (citing *Public Serv. Co. of Ind., Inc. v. Bath Iron Works Corp.*, 773 F.2d 783, 790 (7th Cir. 1985) (finding prejudicial error where "the trial court's rulings resulted in a situation in which plaintiffs were able to present testimony about [a key issue,] but [defendant] was prevented from presenting its version of that issue in any cohesive and complete fashion.")).

GM also acknowledged that the district court had, following its imposition of the enforced quietus, instructed the jury to disregard the extensive evidence that Petitioner had presented regarding GM's alleged noncompliance with FMVSS 201 § 3.4.1. GM argued, however, that the issue of its compliance with the federal safety standard "had been so central in the trial that it was utterly unrealistic to believe that a curative instruction would suffice." GM CA7 Br. at 31 (citing *Joseph v. Brierton*, 739 F.2d 1244, 1248 (7th Cir. 1984) ("[W]e must reverse [if the court gives] a curative instruction that we are convinced could not have cured"); *O'Rear v. Fruehauf Corp.*, 554 F.2d 1304, 1309 (5th Cir. 1977) ("cautionary instructions are effective only up to a certain point," which is passed "after repeated exposure of a jury to prejudicial information")). In addition, GM argued that even if, in theory, a curative instruction could have sufficed, the particular curative instruction given by the district court in this case was inadequate. GM CA7 Br. at 32-33.

In response, Petitioner concentrated his efforts on establishing that any errors made by the district court were indeed harmless, and that the curative instruction given by the trial court was adequate. Petitioner acknowledged, however, that although jurors are presumed to follow instructions to disregard inadmissible evidence, that presumption may be overcome if "'there is an overwhelming probability that the jury will be unable to follow the court's instructions and strong likelihood that the effect of the evidence would be devastating.'" Brief for Appellee DePaepe in *DePaepe v. General Motors Corp.*, No. 96-3886 (7th Cir.) ("DePaepe CA7 Br.") at 18 (quoting *Raybestos Products v. Younger*, 54 F.3d 1234, 1239 (7th Cir. 1995)).

Petitioner also defended the district court's initial ruling that FMVSS 201 § 3.4.1 imposed a performance standard on sun visors—just as Petitioner now defends that ruling in his Petition. *Id.* at 20-23. In the Court of Appeals, however, Petitioner did not make certain of the arguments on this score that he now advances. Specifically, Petitioner did not contend that the National Highway Traffic Safety Administration ("NHTSA")—the agency that promulgated and administers the federal motor vehicle safety standards—lacks the authority to enact "design standards." *Compare* Pet. at 14-17. Nor did he contend that other courts of appeal had ruled that "design standards" were impermissible under the authorizing legislation. *Compare* Pet. at 18.[9]

At oral argument, Petitioner again focused on the issue of harmless error—to the point, even, of unveiling large

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[9] Petitioner offered other arguments in defense of the trial result that are not relevant to the Petition. For example, Petitioner argued that GM had waived various claims of error, and (reversing the position he had taken at trial) claimed that the district court did possess the authority to invalidate FMVSS 201 § 3.4.1.

demonstrative exhibits on which the Seventh Circuit's well-settled harmless error standards were displayed.

B. The court's ruling.

The Seventh Circuit reversed, holding that the district court had committed two errors in its handling of FMVSS 201 § 3.4.1, and a third error with respect to the testimony of Petitioner's expert.

The district court's *first* error, according to the Court of Appeals, was denying GM's motion in limine regarding FMVSS 201 § 3.4.1. The Seventh Circuit held that the standard "was satisfied as a matter of law by the sun visors in the 1984 Buick Regal," and that the district court therefore "should have granted GM's motion in limine and prevented [Petitioner] from arguing to the jury that GM failed to comply with FMVSS 201 § 3.4.1." App. 4a.

The standard was satisfied as a matter of law, according to the Court of Appeals, because it is a "design standard" (specifying only "what a component of a vehicle must be") rather than a "performance standard" (which specifies "what the component must accomplish"). *Id.* at 3a. The Seventh Circuit noted that "FMVSS 201 § 3.4.1 is written as a design standard," and that NHTSA had, in official agency statements, confirmed that the regulation is not a performance standard. *Id.* Because "GM covered the sun visors in 1984 Buick Regal cars with nylon backed by polyurethane foam," and "[n]o one doubts that polyurethane foam dissipates energy when compressed," the Court of Appeals concluded that FMVSS 201 § 3.4.1 (which, again, requires only that cars be equipped with "[a] sun visor that is constructed of or covered with energy-absorbing material") "was satisfied as a matter of law." *Id.* at 3a-4a.

The Court of Appeals also ruled that the district court had committed a *second*, independent error—namely, "declaring FMVSS 201 § 3.4.1 invalid and forbidding either side to

mention it again in the jury's presence," *after* Petitioner had already presented seven days of argument and evidence of GM's supposed noncompliance with the standard. *Id.* As the Court of Appeals explained, GM had "wanted to answer [Petitioner's] presentation (in lieu of which it wanted a mistrial) and to argue on its own behalf that the visor's compliance with FMVSS 201 § 3.4.1 is a reason to conclude that the design was not defective." *Id.* at 3a. The Court of Appeals explained that GM was entitled to make that argument, because "a manufacturer is entitled to inform a jury that its vehicles pass federal muster and to invite the jury to conclude that a vehicle that complies with all federal rules is safe enough to be on the road." *Id.* at 5a.[10] When—after having allowed Petitioner to spend several days arguing to the jury that GM had failed to comply with FMVSS 201 § 3.4.1—the district court precluded all further reference to the standard, "GM was behind the eight ball and never had an opportunity to present its side of the matter to the jury." *Id.*

Significantly, the Court of Appeals went on to consider, and reject, Petitioner's argument "that these two errors—allowing two weeks worth of evidence and argument that GM failed to comply with FMVSS 201 § 3.4.1 followed by an enforced quietus on the subject—were harmless." App. 4a-5a.

At this juncture, it bears mentioning that Petitioner has overlooked the second of the two errors that formed the basis for the Seventh Circuit's reversal. Petitioner thus describes the Seventh Circuit as having reversed based solely on its conclusions that (1) "respondent should have been able to tell the jury that it complied with the standard as a matter of law," and (2) "[P]etitioner should not have been allowed to introduce

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[10] As the Court of Appeals noted, under the governing Illinois law, "compliance with federal safety standards is enough by itself to support a verdict for the manufacturer." *Id.* (citing *Moehle v. Chrysler Motors Corp.*, 93 Ill. 2d 299, 303-04, 443 N.E.2d 575, 577 (1982)).

evidence that implied that the standard was violated." *See* Pet. at 13; *see also id.* at 24. The Court of Appeals' opinion, however, plainly identifies "two errors—allowing two weeks worth of evidence and argument that GM failed to comply with FMVSS 201 § 3.4.1 followed by an enforced quietus on the subject." App. 4a.

The Court of Appeals did make the two findings mentioned by Petitioner, but counted those not as separate errors, but rather as two components of a single error—namely, the district court's erroneous denial of GM's motion in limine. *See* App. 4a ("FMVSS 201 § 3.4.1 . . . was satisfied as a matter of law by the sun visors in the 1984 Buick Regal. The district court should have granted GM's motion in limine and prevented DePaepe from arguing to the jury that GM failed to comply with FMVSS 201 § 3.4.1."). And the Court of Appeals also plainly identified as a *second and independent* error the district court's failure either to allow GM to respond, or to grant a mistrial, after having allowed Petitioner to put on two weeks worth of evidence regarding GM's alleged noncompliance with FMVSS 201 § 3.4.1.

Finally, the Court of Appeals *also* held that the district court committed a third, independent error by allowing Petitioner's expert witness Syson to opine that GM had reduced the amount of padding in its sun visors in order to save money. The Court of Appeals explained that "the whole point of *Daubert* is that experts can't 'speculate.' They need analytically sound bases for their opinions." *Id.* at 9a. Syson's testimony was therefore improper, because he "lacked any scientific basis for an opinion about the motives of GM's designers." *Id.* The Court of Appeals directed that "repetition [of this erroneous testimony] should not be permitted at a retrial." *Id.*

Following the panel's ruling, Petitioner sought rehearing and rehearing *en banc*. In support of his plea for rehearing, Petitioner advanced the same argument that he now makes in his Petition to this Court—namely, that the panel had "[f]ailed

to [f]ollow the [m]andate of Fed. R. Civ. P. 61" (the harmless error rule). *See* Plaintiff-Appellee's Petition for Rehearing and Suggestion for Rehearing *En Banc* in *DePaepe v. General Motors*, No. 96-3886 (7th Cir.) ("DePaepe CA7 Reh'g Pet.") at 1. Petitioner insisted that, contrary to the panel's express finding, "the errors found could not have affected [GM's] 'substantial rights.'" *Id.* Petitioner also complained that the panel's opinion "[f]ail[ed] to [a]cknowledge or [a]pply the [c]ontrolling [s]tandards of [r]eview and [e]rroneously [a]pplie[d] a *[d]e [n]ovo* standard to [r]eview" the district court's rulings, in violation of well-settled Seventh Circuit precedent. *Id.* at 6. In addition, Petitioner protested that the panel opinion—which was authored by Judge Easterbrook—"[l]ack[ed] [f]undamental [a]ttributes necessary to a [m]inimally [a]dequate [a]ppellate [d]ecision" because, *inter alia*, it did not "set forth the standard of review being utilized by the Court." *Id.* at 8-9. Apparently unpersuaded by Petitioner's claims of error, the Seventh Circuit denied rehearing and rehearing *en banc*. App. 22a.

REASONS FOR DENYING THE WRIT

As noted above, the Seventh Circuit reversed and remanded for a new trial based on its conclusion that the district court had committed *two* independent errors regarding the admissibility of evidence of GM's compliance with FMVSS 201 § 3.4.1. *First*, the district court had erred by denying GM's motion in limine concerning FMVSS 201 § 3.4.1 and allowing Petitioner to argue to the jury that GM had failed to comply with that standard. *Second*, the district court had committed an independent error by imposing "an enforced quietus on the subject" of FMVSS compliance after Petitioner had presented extensive evidence of GM's alleged noncompliance with the standard. The Seventh Circuit determined that these errors were not harmless, and therefore required reversal. In addition, the Court of Appeals concluded that the district court erred by

allowing Syson to speculate regarding GM's supposed motive for reducing the amount of padding in its sun visors.

In challenging the Seventh Circuit's decision, Petitioner focuses on the first of these findings of error. Thus, he argues that the Court of Appeals erred (and created a circuit split) in ruling that the district court "should have granted GM's motion in limine and prevented [Petitioner] from arguing to the jury that GM failed to comply with FMVSS 201 § 3.4.1," because that ruling was based on the Court of Appeals' conclusion (which Petitioner contends is erroneous) that FMVSS 201 § 3.4.1 imposes only a "design standard" as opposed to a "performance standard." As we explain in Section II, *infra*, Petitioner is mistaken: The Seventh Circuit's ruling that FMVSS 201 § 3.4.1 does not impose a "performance standard" is correct, and is entirely consistent with NHTSA's own interpretation of that regulation. In any event, that ruling plainly does not create a conflict among the circuits.

Even more fundamental, however, a ruling by this Court reversing the Seventh Circuit's interpretation of FMVSS 201 § 3.4.1, and concluding that the standard actually imposes a performance standard rather than a design standard, *would not alter the outcome of the decision below*. It would not erase the fact that, in the middle of trial and after Petitioner had argued noncompliance for several days, the district court "declar[ed] FMVSS 201 § 3.4.1 invalid and forb[ade] either side to mention it again in the jury's presence." App. 3a. And, as we have seen, the Court of Appeals declared the district court's imposition of this "enforced quietus" to be a second, independent error warranting reversal.[11]

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[11] Again, the enforced quietus constituted error because it denied GM the right "to inform a jury that its vehicles pass federal muster and to invite the jury to conclude that a vehicle that complies with all federal rules is safe enough to be on the road." App. 5a. And deprivation of that right, far from

(continued...)

Because the Seventh Circuit's reversal was based not only on its conclusion that the district court erred by denying GM's motion in limine and allowing Petitioner to argue noncompliance to the jury, but also on its conclusion that the enforced quietus imposed by the district court constituted error, Petitioner can obtain the reversal of the Seventh Circuit's ruling only if he establishes that the district court did not err by imposing an enforced quietus. And, of course, this Court will not normally grant a petition for writ of certiorari to review an alleged conflict where the resolution of the conflict would not change the result reached below. *See* R. Stern, E. Gressman, S. Shapiro & K. Geller, Supreme Court Practice § 4.4(6) (7th ed. 1993) (citing *Sommerville v. United States*, 376 U.S. 909 (1964)).

Here, the Court of Appeals' holding that GM was unfairly prejudiced by the district court's enforced quietus regarding compliance with FMVSS 201 § 3.4.1 is correct, and in any event involves nothing more than an entirely routine application of well-settled, and undisputed, principles of harmless error analysis. Moreover, the Court of Appeals *also* held that the district court committed yet another independent error, by allowing Petitioner's expert Syson to testify, without any basis in fact, that the reason why GM designed the visor the way it did was to save money—yet another error that was grossly prejudicial, uncured, and justifies a new trial. Neither of these other holdings by the Court of Appeals—which are necessary to decide this case—raises a certworthy question.

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[11] (...continued)
harmless, was especially damaging given that Petitioner had been allowed to argue noncompliance at length: "When the judge precluded all further reference to FMVSS 201 § 3.4.1, GM was behind the eight ball and never had an opportunity to present its side of the matter to the jury." *Id.*

I. The Court of Appeals' Ruling That the District Court's "Enforced Quietus" Ruling Was Not Harmless Is Not Worthy of This Court's Review, and In Any Event Was Correct.

Petitioner does not dispute that it was error for the district court to impose the enforced quietus upon GM. Instead, the only argument that Petitioner offers that could possibly constitute grounds for reversing the Court of Appeals' enforced quietus ruling is his argument that any errors that were committed by the district court *were harmless*. *See* Pet. at 22-28. The Court of Appeals, however, expressly determined that the district court's FMVSS errors (including the erroneous imposition of the enforced quietus) were *not* harmless. Petitioner's argument, therefore, reduces to a claim that the Seventh Circuit's harmless error ruling was incorrect. That claim is not only quintessentially uncertworthy—for it entails only case-specific error correction involving the application of settled law (the harmless error rules) to the facts of this case—but is wrong to boot.

A. Petitioner's challenge to the Seventh Circuit's harmless error ruling amounts to a plea for error correction.

Petitioner claims that the Seventh Circuit erred in concluding that the errors committed by the district court were not harmless and warranted a new trial. To support that contention, Petitioner maintains that "the court of appeals[] refus[ed] to recognize and apply the correct standard of review": "The three members of the panel treated this appeal as if they were trial judges" and "ignored the findings of the trial judge." Pet. at 27, 22. Had the court "applied the proper standard of review," Petitioner insists, "it could not have directed that a new trial take place." *Id.* at 24.

Merely stating this argument suffices to establish that it does not warrant an exercise of this Court's certiorari jurisdiction.

Petitioner does not contend that the Seventh Circuit systematically misapplies the proper standard of review in conducting harmless error review. Nor does he maintain that the Seventh Circuit's formulation of the standard of review for harmless error is in conflict with the standard of review employed by other circuits.[12] Instead, his claim is simply that, in this case, a panel of the Seventh Circuit applied the wrong standard of review and therefore erred in concluding that the error in question was not harmless. This is, of course, simply a claim that the panel misapplied settled law to the facts of this case. This Court does not normally grant certiorari to consider such case-specific claims of error correction, and Petitioner offers no reason why the Court should start doing so now.

B. There is no error to correct.

In addition to being uncertworthy, Petitioner's challenge to the Court of Appeals' harmless error ruling is insubstantial and without merit. Petitioner contends that the Seventh Circuit erred by applying a *de novo* standard of review in evaluating whether the errors committed by the district court were harmless, rather than the abuse-of-discretion standard that Petitioner claims is applicable. *See* Pet. at 14, 22, 24, 28.

The most basic problem with this contention is that Petitioner is unable to point to any evidence in the record to support his assertion that the Court of Appeals applied a *de novo* standard of review. In a moment of candor, Petitioner

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[12] Indeed, in seeking rehearing below, Petitioner cited and quoted from several Seventh Circuit opinions setting forth the standard of review for harmless error determinations—including one opinion by Judge Easterbrook, the author of the panel opinion in this case—in his unsuccessful attempt to convince the full court that the panel's harmless error ruling was erroneous and deserving of the full court's attention. *See* Plaintiff-Appellee's Petition for Rehearing and Suggestion for Rehearing *En Banc* in *DePaepe v. General Motors*, No. 96-3886 (7th Cir.) ("DePaepe CA7 Reh'g Pet.") at 1 (citing *Israel Travel Advisory Service, Inc. v. Israel Identity Tours, Inc.*, 61 F.3d 1250, 1260 (7th Cir. 1995)).

tacitly acknowledges the lack of any support for his assertion that the Court of Appeals applied a *de novo* standard —arguing that "[t]he court of appeals *apparently* believed itself free to ignore the district court's findings regarding lack of prejudice and to determine the question of whether a new trial should be granted on a *de novo* basis." Pet. at 24 (emphasis added). Thus, Petitioner's core contention—that the Court of Appeals applied the wrong standard of review—is supported by nothing other than his own speculation.

Indeed, Petitioner's current contention—that the Court of Appeals erroneously adopted a *de novo* standard of review—is at odds with his contention at the rehearing stage that the panel's decision did not state *what* standard of review it was applying. In his request for *en banc* rehearing, Petitioner complained that "[t]he [panel] [o]pinion [l]acks [f]undamental [a]ttributes necessary to a [m]inimally [a]dequate [a]ppellate [d]ecision" because it "failed to set forth the standard of review being utilized by the Court."[13] DePaepe CA7 Reh'g Pet. at 8-9. But absent any evidence to the contrary, it must be assumed that the Seventh Circuit is familiar with the standards that govern its appellate review, and that the Court of Appeals

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[13] The Petition for Rehearing went on to argue that "[w]hile plaintiff recognizes that there are varying styles of appellate opinion writing, the maxim that any opinion should at least set forth the governing standard of review is fundamental," and that "an accurate statement of the facts and relevant authorities is also critical to the basic integrity of a judicial opinion." DePaepe CA7 Reh'g Pet. at 9. In the view of Petitioner's appellate counsel (who was not the distinguished Mr. Morrison, who is counsel of record here), the panel opinion "omits or misstates . . . key facts and relevant legal authorities which were critical to a proper decision of this case[.]" *Id.* While we suspect that these attacks on the Court of Appeals' decision are not likely to have shattered Judge Easterbrook's confidence, they do highlight that, at bottom, Petitioner's claim that the Court of Appeals applied the wrong standard of review amounts to nothing more substantial than a complaint that the Court of Appeals did not explicitly recite the applicable standard of review.

applied the correct standard of review. At bottom, Petitioner's claim that the Seventh Circuit applied the wrong standard of review in conducting its harmless error analysis reduces to nothing more than a complaint that the panel did not explicitly recite the standard of review. But there is no basis to assume that the Court applied the *wrong* standard of review.

Moreover, the law governing whether the district court's mid-trial reversal was cured by the instruction it gave the jury was not in dispute on appeal. GM fully acknowledged (a) that the district court gave a curative instruction, and (b) that there is a presumption that a jury will follow an instruction to disregard inadmissible evidence. *See, e.g.*, GM CA7 Br. at 30-33; GM CA7 Reply Br. at 20-21. GM argued, however, that it was simply beyond the pale to believe that the instruction given by the district court in this case could cure the impact of what the jury had heard about FMVSS 201 § 3.4.1. *See supra* at 8. GM cited, in this regard, the Seventh Circuit's ruling in *Joseph v. Brierton*, 739 F.2d 1244, 1248 (7th Cir. 1984), which holds that "we must reverse [if the trial court gives] a curative instruction that we are convinced could not have cured." GM CA7 Br. at 31; *see also id.* (quoting *O'Rear v. Fruehauf Corp.*, 554 F.2d 1304, 1309 (5th Cir. 1977) ("cautionary instructions are effective only up to a certain point," which is passed "after repeated exposure of a jury to prejudicial information")); GM Reply Br. at 20-21. Petitioner invoked essentially the same rule (which he now describes in his Petition as a "well-accepted tenet of appellate review," Pet. at 24), citing the Seventh Circuit's decision in *Raybestos Products v. Younger*, 54 F.3d 1234, 1239 (7th Cir. 1995), for the proposition that an "appellate court must 'presume that the jury will follow an instruction to disregard inadmissible evidence *unless there is an overwhelming probability that the jury will be unable to follow the court's instructions and strong likelihood that the effect of evidence would be devastating* .'" DePaepe CA7 Br. at 18 (emphasis added).

None of the principles governing this harmless error analysis was, or is, in dispute. Rather, Petitioner simply disagrees with the Court of Appeals' application of these well-settled principles to the very odd and unique facts of this case.[14]

Finally, in any event, the Seventh Circuit's determination that the district court's errors (and specifically its enforced quietus ruling) were not harmless was amply supported in the record. Perhaps most significant, in this regard, were the repeated concessions at trial by Petitioner's own counsel, who agreed that it would be "impossible to erase what this jury has heard on this subject [of FMVSS compliance] from their minds," and that "to try and separate out this feature of the case from the jury's minds at this juncture would not be effective or possible." CA7 App. 341-42, 347; *supra* at 6. With such evidence in the record, it is hardly surprising that the Court of Appeals determined that the enforced quietus (like the district court's erroneous denial of the motion in limine) was not harmless.

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[14] Persisting in his stylistic critique of the Seventh Circuit's opinion, Petitioner also complains that "[t]he opinion *does not even mention the fact that this appeal was taken subsequent to the trial court's denial of [GM's] motion for new trial.*" Pet. at 23 (emphasis in original). He also cites cases from this Court and the courts of appeals for the proposition that a district court's ruling on a motion for new trial is reviewed for abuse of discretion. *Id.* at 23 and n.15. As previously noted, GM did not assert the district court's ruling on the new trial motion as a separate and independent assignment of error; instead, it challenged the district court's various rulings in the context they were rendered, such as the district court's denial of GM's motion in limine with respect to FMVSS 201 § 3.4.1. In any event, the Seventh Circuit, of course, applies the same standard of review, *see, e.g., Mayall v. Peabody Coal Co.*, 7 F.3d 570, 572 (7th Cir. 1993), and any suggestion that the panel was unaware of that standard is unfounded and specious.

II. The Seventh Circuit Properly Interpreted FMVSS 201 § 3.4.1 As Not Imposing a Performance Standard.

For the reasons set forth above, the Court of Appeals' ruling that the district court committed harmful error by imposing the enforced quietus is a factbound, case-specific ruling not worthy of this Court's review. In addition, Petitioner's suggestion that the Court of Appeals applied the wrong standard in rendering that ruling is unsupported and without merit. Accordingly, this Court need not even reach Petitioner's challenge to the Court of Appeals' interpretation of FMVSS 201 § 3.4.1: As noted previously, even were this Court to reverse that ruling, it would not change the outcome of the case, as long as the Court of Appeals' enforced quietus ruling stands. *See* R. Stern, E. Gressman, S. Shapiro & K. Geller, Supreme Court Practice § 4.4(6) (7th ed. 1993).

In any event, Petitioner's challenge to the Seventh Circuit's FMVSS ruling is also unavailing. Petitioner contends that this ruling created a circuit split, and that it was erroneous. Both claims are wrong.

A. The Seventh Circuit's decision does not create a conflict regarding the construction of motor vehicle safety standards.

Petitioner claims that the Seventh Circuit's interpretation of FMVSS 201 § 3.4.1 as a "design standard" rather than a "performance standard" has created a conflict among the federal appellate courts. The claimed conflict is, in fact, nonexistent.

Petitioner claims that the Seventh Circuit's ruling creates a conflict because (he maintains) three other courts of appeals have "uniformly held" that the Department of Transportation "is 'generally charged with developing performance standards, not design specifications.'" Pet. at 18. Of course, the mere assertion that NHTSA is "generally charged" with issuing

performance standards does not conflict with the Seventh Circuit's recognition that some of the standards issued by NHTSA can be characterized as "design" standards. And, indeed, the cases Petitioner cites expressly recognize that safety standards can have "design" elements as well as "performance" elements. For example, the First Circuit explained in *Wood v. General Motors Corp.*, 865 F.2d 395 (1st Cir. 1988) that:

> [A]lthough design and performance standards are analytically distinct, in practice the line is not so clear. For example, a performance standard requiring that a vehicle's driver should be able to see in the dark is not very different from a design standard requiring that a vehicle have lights. Similarly, although FMVSS 208 is a performance standard dealing with the protection of occupants from the second collision, it specifies that vehicles must either have seat belts meeting certain criteria or have other safety equipment (passive restraints) that will protect occupants from the second collision. *By requiring seat belts or passive restraints, FMVSS 208 has elements of a design standard.*

Id. at 416-17 (emphasis added). Significantly, the First Circuit made this statement in the context of *rejecting* a plaintiff's argument (against pre-emption) that was in turn founded on the assertion that "under the Safety Act, NHTSA may only promulgate performance standards." *Id.* at 416.

Similarly, the Tenth Circuit in *Washington v. Dept. of Transp.*, 84 F.3d 1222 (10th Cir. 1996), acknowledged that "the performance-design distinction is much easier to state in the abstract than to apply definitively . . . in concrete situations," and that "NHTSA's regulatory authority extends beyond the performance of motor vehicles *per se*, to particular items of equipment." *Id.* at 1224-25. *See also id.* at 1225 ("NHTSA has frequently drawn on this authority to promulgate standards, particularly those dealing with safety devices, that

take the bipartite form reflected in the ABS standard of [49 C.F.R.] § 571.121: 'first, motor vehicles are required to have specific items of equipment; and, second, these enumerated items of equipment are subject to specific performance standards.'"). These statements by the Tenth Circuit are entirely consistent with the Seventh Circuit's statement, which was that:

> Motor vehicle safety standards come in two flavors: design and performance. Design standards specify what a component of a vehicle must be; performance standards specify what the component must accomplish. A requirement that every car have safety belts is a design standard, a requirement that each anchorage of each safety belt withstand a 5,000 pound force (see FMVSS 210 § 4.2.1) is a performance standard.

App. 3a.

As for the Sixth Circuit, finally, that court has expressly recognized that the MVSA "defines 'safety' at least in part in terms of design," and indeed (in one of the authorities relied on by Petitioner) rejected a challenge to a safety standard that it described as "in a sense a design restriction." *Chrysler Corp. v. Dept. of Transp.*, 515 F.2d 1053, 1057-58 (6th Cir. 1975). Notably, in approving that standard, the Sixth Circuit explained that the reason most standards are stated in "performance" terms rather than "design" terms is because Congress "decided that the need for safety could best be met by encouraging competition among manufacturers in devising methods to achieve objective performance goals," and "wished to avoid the tedious stylistic uniformity that would result if the NHTSA undertook to control vehicle design on a broad scale." *Id.* at 1058. The Sixth Circuit found that neither of these Congressional goals was frustrated by NHTSA's issuance of the standard requiring rectangular headlights to be of a certain size (even though the Sixth Circuit viewed that standard as "in a sense a design restriction"). The court explained that: "[W]e

do not believe that standardization of headlamps is seriously inconsistent with the congressional desire not to stifle innovations in automotive styling. Headlamps are a relatively small component in overall vehicle design, and they have been standardized for many years without depriving motorists of a wide variety of automobile designs." *Id.* at 1058-59. The same could be said of sun visors: imposition of a requirement that cars have padded sun visors does not seriously "stifle innovations in automotive styling" or "depriv[e] motorists of a wide variety of automobile designs."

At the end of the day, therefore, Petitioner's claim of conflict reduces to the assertion that "no court, prior to the instant decision, has ever declared that the [Department of Transportation ("DOT")] has authority to issue design standards *even if they contain no safety performance requirements*." Pet. at 18 (emphasis added). This last-ditch argument fails for two reasons. *First*, whether accurate or not, it is beside the point: even if no court has so held, that would signify merely that no court has been called on to decide squarely the question whether DOT may issue "design standards" that do not contain specific performance requirements. In order for a conflict to exist, Petitioner would have to identify decisions from other courts of appeals holding that DOT *does not* have the power to issue such design standards—and the cases cited by Petitioner do not meet that description. *Second*, even there were any truth to Petitioner's claim that design standards must, as a rule, be coupled with performance requirements, that rule is satisfied here: Standard 201 is a "bipartite" standard, which both requires that automobiles have padded sun visors, *see* § 3.4.1, and sets performance standards for the mounting of those sun visors, *see* § 3.4.2.[15]

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[15] Subsection 3.4.2 (which is now referred to as § 5.4.2, *see supra* at n.4) (continued...)

In short, the conflict Petitioner claims to have identified is wholly illusory.

B. The Seventh Circuit's interpretation of FMVSS 201 § 3.4.1 is correct and consistent with the promulgating agency's interpretation.

As the foregoing discussion illustrates, the Seventh Circuit's holding that FMVSS 201 § 3.4.1 is not a performance standard is not the vast and radical departure from the settled construction of federal motor vehicle safety standards that Petitioner would have this Court believe. Indeed, as the Court of Appeals noted, NHTSA—the agency that promulgated and enforces the standard—has stated unequivocally *on at least three occasions* that FMVSS 201 § 3.4.1 "is not a performance standard." See 60 Fed. Reg. 60,404 (1995); 61 Fed. Reg. 23,413 (1996); 61 Fed. Reg. 62,934 (1996). These statements by NHTSA are decisive on the issue. As this Court has recognized, a federal agency's interpretation of its own regulations "must be given '"controlling weight unless it is plainly erroneous or inconsistent with the regulation."'" *Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 512 (1994) (quoting *Udall v. Tallman*, 380 U.S. 1, 16 (1965)). Moreover, the plain terms of FMVSS 201 § 3.4.1 do not identify a specific performance objective.

Petitioner's attempts to cast doubt on the Seventh Circuit's conclusion that FMVSS 201 § 3.4.1 does not amount to a performance standard are futile.

First, Petitioner suggests that NHTSA's repeated statements that FMVSS 201 § 3.4.1 "is not a performance standard" may

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[15] (...continued)
provides that "[e]ach sun visor mounting shall present no rigid material edge radius of less than 3.2 mm that is statically contactable by a spherical 165 mm diameter head form." *See* 49 C.F.R. § 571.201 § 5.4.2. Earlier versions stated the relevant measurements in inches.

be disregarded because those statements "are not final rules issued after notice and comment." Pet. at 17. Agencies' interpretations of their own regulations, however, are not found only in "final rules issued after notice and comment." *See, e.g., Lyng v. Payne*, 476 U.S. 926, 939 and 932 n.3 (1986) (unpublished sample press release). Petitioner does not (and cannot) dispute that the three statements in question are official statements by NHTSA. They were made when NHTSA was considering whether to rescind FMVSS 201 § 3.4.1; in proposing the change, and seeking comment thereon, NHTSA explained that FMVSS 201 § 3.4.1 "is not a performance standard." 60 Fed. Reg. 60,404 (1995). NHTSA subsequently reiterated this description of FMVSS 201 § 3.4.1 in a regulatory evaluation of the proposed change, *see* 61 Fed. Reg. 23,413 (1996), and again in its decision stating that it would leave FMVSS 201 § 3.4.1 in place, *see* 61 Fed. Reg. 62,934 (1996). The Seventh Circuit properly looked to these repeated, official statements by the promulgating agency in concluding that FMVSS 201 § 3.4.1 does not impose a performance standard.

Second, Petitioner contends that other statements by NHTSA (specifically, statements made in 1982 and 1988) contradict NHTSA's later repeated statements that FMVSS 201 § 3.4.1 is not a performance standard. Pet. at 17-18. This argument is misleading and incorrect. The sleight-of-hand that Petitioner is attempting is to have the Court overlook the fact that in the 1982 and 1988 pronouncements, NHTSA was speaking of FMVSS standard 201 *generally*, whereas in the statements described above (and relied on by the Seventh Circuit), NHTSA was speaking specifically of *subsection 3.4.1* of FMVSS standard 201—that is, the provision that actually is at issue in this case. This distinction is critical, because the 1982 and 1988 statements highlighted by Petitioner state only that *standard 201* (of which § 3.4.1 is but one subsection) sets

performance requirements for sun visors[16]—not that *subsection 3.4.1* of standard 201 does so. And, indeed, there *is* a subsection of FMVSS 201 that sets a performance standard for sun visors, but it is not subsection 3.4.1. It is, rather, subsection 3.4.2—which sets a performance standard for the *mounting* of sun visors (and which is not at issue in this case). *See supra* at n.15. In short, the 1982 and 1988 statements that Petitioner highlights do not contradict NHTSA's other statements (upon which the Court of Appeals relied), and provide no support for Petitioner's claim that *subsection 3.4.1* of FMVSS 201 imposes a "performance standard."

Third, Petitioner argues that the NHTSA statements cited by the Court of Appeals are inconsistent with the definition of "motor vehicle safety standard" in the Motor Vehicle Safety Act ("MVSA"). Petitioner, however, is a selective reader. As explained in the very cases that Petitioner cites in attempting to concoct a circuit split, *see supra* at II.A, the MVSA "defines 'safety' at least in part in terms of design." *Chrysler Corp. v. Dept. of Transp.*, 515 F.2d 1053, 1057 (6th Cir. 1975). *See also Washington v. Dept. of Transp.*, 84 F.3d 1222, 1225 (10th Cir. 1996) ("NHTSA's regulatory authority extends beyond the performance of motor vehicles *per se*, to particular items of equipment"). Consequently, NHTSA's repeated statements that FMVSS 201 § 3.4.1 "is not a performance standard" are unremarkable, and not at odds with the MVSA.

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[16] The 1982 statement highlighted by Petitioner states that "*Standard No. 201* sets performance requirements for instrument panels, interior compartment doors, sun visors and arm rests to prevent or reduce injuries to persons thrown against them in crashes." 47 Fed. Reg. 25,170 (1982) (emphasis added). The 1988 statement, similarly, provides only that "*Standard No. 201* . . . regulates the performance of certain vehicle interior surfaces in a crash, specifying impact tests or requiring padding for instrument panels, seat backs, sun visors, armrests and glove compartment doors." 53 Fed. Reg. 2,516 (1988) (emphasis added).

Finally, contrary to Petitioner's suggestion, the Seventh Circuit's interpretation does not render FMVSS 201 § 3.4.1 a nullity. The standard still contains important safety considerations: Each vehicle must still provide sun visors, which serve a vital purpose in preventing accidents caused by momentary sun blindness, and the visors must be constructed of or covered by an energy-absorbing material, and therefore cannot be made of sharp, dangerous materials. As NHTSA noted in refusing to repeal § 3.4.1, it "is too substantive to rescind." 61 Fed. Reg. 62,934 (1996).

In short, the Seventh Circuit's interpretation of FMVSS 201 § 3.4.1 creates no conflict, and is correct.

III. The Seventh Circuit's Holding That the District Court Erred By Allowing Syson to Speculate Constitutes An Alternative Ground for the Decision Below, And Is Not Challenged by Petitioner.

Finally, Petitioner does not challenge the Seventh Circuit's third, independent finding of error—its holding that "the district judge erred by allowing Syson to testify" because "Syson lacked any scientific basis for an opinion about the motives of GM's designers." App. 9a. Accordingly, even were this Court to find the two other Seventh Circuit rulings in this case (a) worthy of this Court's certiorari review, and (b) erroneous, the Seventh Circuit's third finding of error by the district court would remain undisturbed, and the outcome of the decision (reversal of the district court's judgment) would not change.

In an apparent attempt to downplay the Seventh Circuit's holding on this issue, Petitioner describes the district court's erroneous admission of Syson's testimony as a "limited error." Pet. at 13-14 n.6. He offers no explanation, however, for that characterization, and certainly can draw none from the Seventh Circuit's opinion. Petitioner also notes that the Seventh Circuit

"did not cite" the Syson error "as part of its basis for granting a new trial." *Id.* That is irrelevant, however: The Court of Appeals had already ordered a new trial before addressing the Syson error. Moreover, the Court of Appeals clearly stated that repetition of the error of allowing Syson's speculation about cost savings "should not be permitted at a retrial." App. 9a. There would have been no reason to issue that admonition if, as Petitioner is apparently suggesting, the Court of Appeals did not believe that error to be significant.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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